Pro-Spec Painting, Inc. *and* Painters District Council 711. Cases 4–CA–31034 and 4–CA–31050

July 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On October 1, 2002, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent and the Charging Party Union filed exceptions. The General Counsel and the Charging Party Union filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pro-Spec Painting, Inc., Vineland, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Noelle M. Reese, Esq., for the General Counsel.
Ronald W. Yarbrough, pro se, and *Thomas E. Weiers Jr. (on brief)*, for the Respondent.
Edward McGee and *Mark E. Belland, Esq. (on brief)*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on August 14, 2002. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by making coercive statements to employees, and violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Tim Hemberger and Tom Henze and laying off employee Phillip Hann because of union activities. Respondent filed an answer denying the essential allegations in the complaint. The parties submitted posttrial briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, with an office and principal place of business in Vineland, New Jersey, is engaged as a painting contractor in the construction industry. I find, as Respondent concedes, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

Respondent, which undertakes large commercial painting projects in several States, is headed by President Ron Yarbrough. From November 2001 through February 2002, Respondent was engaged in painting the Vineland Developmental Center, a medical clinic owned by the State of New Jersey, under the auspices of Bueno Plumbing, the general contractor on the job. One of the painters on that job was Tim Hemberger, who had been with Respondent since June 2000, and moved from project to project until he was assigned to the Vineland jobsite in November 2001. Hemberger was a highly regarded employee who had received favorable evaluations from Respondent, including one that contained a notation that he was "definitely" a person who should be trained for a foreman position. His last evaluation was dated July 6, 2001, and it reflected that he either met or exceeded all standards for work quality and quantity, knowledge, work relations and dependability. At the Vineland jobsite, he essentially directed other employees, when Yarbrough, who occasionally worked on the jobsite, was not present; Hemberger also transmitted and implemented instructions from Yarbrough on how the job was to proceed. In addition to Hemberger and several other employees who worked at the Vineland jobsite sporadically, two other employees regularly worked at the jobsite, John Tokach and apprentice Phillip Hann.[1]

[1] The Respondent and the Charging Party Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) when Respondent's president, Ron Yarbrough, told employee Phillip Hann that Tim Hemberger was no longer working for the Respondent because Hemberger had joined the Union, and when Yarbrough threatened to terminate Hann if he told Hemberger that Hann was painting Yarbrough's house.

[1] After conceding in his initial testimony that Hemberger was not a supervisor and without having raised the matter in his answer, Yarbrough made a belated attempt to show that Hemberger was a supervisor within the meaning of the Act. That attempt, in an effort to remove Hemberger from coverage under the Act, must fail since Hemberger's only authority that came close to any of those set forth in Sec. 2(11) was that of directing employees. But the evidence clearly shows that Hemberger did not direct employees using independent judgment. He essentially transmitted the orders of Yarbrough or others, including those of the job superintendent of the general contractor, to the other employees on the job. In these circumstances, Respondent has not shown that Hemberger was a supervisor within the meaning of the Act, and Hemberger was, in fact, an employee.

On Monday, January 7, 2002, Hemberger spoke by telephone to Nelson Thompson, an official of the Union, about possible union representation. There had previously been general discussion about unions among Respondent's employees because employees of other employers on the job were union members. But, after talking to Thompson, Hemberger became active. He solicited his fellow employees, Tokach and Hann, at the jobsite on January 7 and 8. Hemberger told them that he was dissatisfied with the way he was treated and was considering joining the Union. In response, Tokach expressed opposition to union representation and Hann expressed an interest. I find, as explained more fully later in this decision, that Yarbrough learned of Hemberger's expressions of prounion sentiment at this time, probably from Tokach.

The next day, Wednesday, January 9, at about 8 a.m. in the morning, Yarbrough appeared on the job and handed Hemberger a written memorandum stating that Yarbrough found Hemberger's performance "unsatisfactory" and demanding his "immediate resignation effective this morning." The memorandum also stated that, if Hemberger did not resign, he would be terminated "without further warning if your performance continues to be unsatisfactory." Prior to receiving this memorandum, Hemberger had not been told by Yarbrough or anyone else in authority for Respondent that his work was unsatisfactory. He had not previously received a warning or a complaint about his work and, as indicated, his prior evaluation was complimentary. Nor was Hemberger told by Yarbrough on January 9 exactly how his work was deficient, although Yarbrough did mention Hemberger's productivity and stated that Hemberger could do better if he wanted to. Yarbrough had asked Hemberger the day before, January 8, how many doors he had painted and Hemberger said he had painted 18 doors. Despite delivering the memorandum and talking to Hemberger on January 9, Yarbrough did not terminate Hemberger, who worked the rest of the day and all day the next day, Thursday, January 10. Indeed, Yarbrough did not even visit the jobsite on January 10.[2]

On January 9, at about 4 o'clock in the afternoon, Hemberger met with Thompson in person at a local restaurant. At that time he agreed to join the Union and signed a union authorization card. The next day, Thursday, January 10, Thompson visited the Vineland jobsite and spoke to the three employees present, Hemberger, Tokach, and Hann. These employees confirmed their positions on union representation that had been expressed earlier in conversations between them. Although Tokach remained opposed to union representation, Hann subsequently signed a union authorization card.

The next day, Friday, January 11, the Union put up a picket line outside the jobsite, with signs identifying a dispute with the Respondent. Since many employees of other employers at the jobsite, including those of the general contractor, were union members, most of them honored the picket line. The three employees of Respondent, Hemberger, Tokach, and Hann, did not work that day. At about 8 a.m., Hemberger called Yarbrough by telephone and notified him of the picket line and stated that he did not feel comfortable crossing the line. Yarbrough told Hemberger that he was not ordering Hemberger to cross the line but stated that Hemberger could cross it if he wanted to work. Yarbrough also said he would try to resolve the dispute. Later that day, Hemberger joined the picket line and held a picket sign. Hemberger called Yarbrough later in the day and learned that the labor dispute had not yet been resolved.

Hemberger also called Yarbrough on Monday, January 13, and asked if Yarbrough had any work for him. Yarbrough said he did not. Nor did Yarbrough ever again call Hemberger for work. About 2 or 3 weeks later, Hemberger went to Yarbrough's office to ask for work; Yarbrough again told Hemberger he had no work for him. Hemberger never received an official termination notice from Respondent, but he never again worked for Respondent.[3]

At the end of January 2002, at about the same time Hemberger was trying to get Yarbrough to assign him more work, Yarbrough had occasion to mention Hemberger to employee Phillip Hann, who was assigned, at about that time, to paint Yarbrough's house. According to Hann's testimony, the two men were riding together in Yarbrough's truck when Yarbrough said that Hemberger had joined the Union and was not working even though he kept calling for work. In a second conversation shortly thereafter, again in his truck, Yarbrough told Hann not to mention to Hemberger that Hann was painting Yarbrough's house because, if he did, "the job" would be "shut down" and Hann would be terminated. (Tr. 181–183, 203–204.)[4]

[2] The factual statement dealing with Hemberger is based primarily on his credible testimony. Yarbrough's testimony included a number of contradictions, which reflect adversely on his credibility. For example, he initially testified that he visited the jobsite on January 10, but, later, in response to a question from me, he admitted that he did not visit the site on that day. He occasionally expressed a lack of recall, particularly when describing conversations between himself and Hemberger about the picket line subsequently put up by the Union. Because of these and other flaws in his testimony, I cannot credit any of Yarbrough's testimony where it conflicts with that of Hemberger, who testified candidly and in meaningful detail.

[3] Hemberger actually went back to the Vineland jobsite to finish up the painting project for Bueno Plumbing, the general contractor, after Bueno terminated the Respondent's contract. He worked on the project for 2 days.

[4] Yarbrough denied Hann's versions of these conversations. But he did admit that he discussed Hemberger with Hann and stated that Hann may have confused what Yarbrough said. Yarbrough testified that Hann initiated the discussion of Hemberger and said that Hemberger kept calling Hann, presumably about seeking work. I find Yarbrough's testimony in this respect implausible and unreliable. It would be more likely that Yarbrough would bring up Hemberger's attempt to get more work since it is undisputed that Hemberger did in fact contact Yarbrough to seek more work. I therefore credit Hann, who was more candid and forthright in his testimony. Finally, Yarbrough's testimony is suspect because his explanations for the terminations of Hemberger and Henze were unpersuasive and pretextual, as discussed more fully later in this decision.

At the request of the general contractor, Yarbrough contacted Union Business Agent Dan Scioli in an attempt to resolve the labor dispute that had spawned the picketing. On January 14, Yarbrough and Scioli exchanged letters by fax concerning a proposed agreement covering the Vineland Developmental Center jobsite. On January 28, 2002, the parties entered into a labor agreement covering only the Vineland job, which provided, inter alia, for the hiring of one member from the Union's hiring hall. As a result, union member Tom Henze, a painter with 20 years of experience, was hired by Respondent for the Vineland job. Henze reported for work on January 28 and spoke with Tokach, who was apparently in charge, taking over the same job assignment responsibilities handled by Hemberger when Yarbrough was not present. After a discussion between Tokach and Henze about the latter's union affiliation, Tokach left to call Yarbrough and returned to tell Henze that Yarbrough expected Henze to paint 28 doors per day. The evidence shows that no one on the Vineland job achieved that standard, especially when there was other work to do besides painting doors. Henze worked 3 days at the Vineland jobsite, and was terminated at 3 p.m. on January 30, "as a result of unsatisfactory performance," according to a letter written by Yarbrough that day to Business Agent Scioli. In that same letter, Yarbrough stated that Respondent would have no employees at the Vineland jobsite the next day until he and Scioli came to an understanding of their expectations under the recently signed labor agreement between the Union and Respondent. After terminating Henze, Yarbrough did not ask the Union to provide another painter from its hiring hall. Instead, the next day, January 31, 2002, Yarbrough sent another letter to Scioli in which he terminated the labor agreement.

On January 29, 2002, the day before Henze was fired and 2 days before Yarbrough terminated the Vineland project-only labor agreement between the Union and Respondent, the Union filed an election petition with the Board's Regional Office in Philadelphia. That petition sought to represent the Respondent's employees in New Jersey, the geographical scope of the Union's jurisdiction. The petition, which was served on Respondent by fax the same day it was filed, stated that there were four employees in the unit and at least 30 percent of them supported the petition. A second, revised petition was filed on February 7, 2002, and a hearing was held on the petition on February 22, 2002. Respondent contested the petition and asked that it be dismissed, arguing that it did not currently perform work in New Jersey and had no plans to do so in the foreseeable future. In a decision dated March 12, 2002, the Regional Director for Region 4 dismissed the petition on the grounds asserted by Respondent. In the decision, the Regional Director found that the general contractor had terminated its subcontract with the Respondent as of February 12, 2002, with between 120 and 250 man-hours remaining on the job.

Before the Respondent's subcontract for the Vineland Developmental Center job was terminated, Respondent attempted to complete the Vineland job. On Saturday, February 2, Respondent sent four painters, none of them from the Union's hiring hall, to the Vineland job. Yarbrough conceded that Respondent did not normally work on Saturdays and he paid the painters overtime for their work on that day. Respondent did not apparently work on the Vineland job again, except for 2 hours on February 12, the same day the Respondent's subcontract was terminated, a matter to which I will return later in this decision.

One of the painters utilized for the Saturday work on the Vineland job was Phillip Hann, an apprentice who was hired by Respondent in November 2001. He worked occasionally on the Vineland job and occasionally in the Respondent's shop. In late January and early February 2002, Yarbrough also engaged Hann to paint his personal residence. It is unclear whether Yarbrough paid Hann out of personal or corporate funds to perform this work. In any event, Hann worked about 8 hours per day painting Yarbrough's house, under Yarbrough's general directions because Yarbrough was only present at the house at the beginning and the end of each workday. It is unclear how much additional painting work had to be performed when Hann was directed to stop painting the house. It does appear, however, that Yarbrough told Hann, on February 5, to stop painting the house. There is a conflict in testimony between Yarbrough and Hann as to what was said in this conversation. Yarbrough testified that he told Hann that since he would be away and beginning an extended vacation the next day, he did not want Hann to be painting while he was gone. Hann testified that Yarbrough told him that "the job" at Yarbrough's house was "being shut down" because of Yarbrough's problems with the Union (Tr. 184–185). I shall discuss that issue further later in this decision.

About a week later, on February 12, 2002, Hann was part of a crew of Respondent's painters who performed additional work on the Vineland job, which turned out to be Respondent's final work on the project. After the crew worked about 2 hours on the Vineland job on February 12, the Respondent's subcontract for that job was cancelled. Later that day, Yarbrough met with Hann to discuss Hann's future employment with Respondent. According to Yarbrough, Hann had been assigned to work on one of Respondent's Pennsylvania jobsites, but Hann declined to report to that job because he did not want to take the job as an apprentice. He wanted to become a journeyman, but Yarbrough did not want to employ Hann as a journeyman. Hann apparently also wanted to do some work on his own as an independent contractor. Yarbrough's testimony on this point is corroborated by an internal memo prepared by Yarbrough on February 15, 2002, and received in evidence in this case. Yarbrough's testimony is also essentially corroborated by that of Hann, who testified that he did not want to continue working for Respondent as an apprentice and he would be seeking "side work for myself." (Tr. 188.) Hann conceded, on cross-examination, that he declined a job assignment from Respondent at about this time because he was "completing my side work." (Tr. 200.) He also conceded that Yarbrough told him that since Hann was no longer interested in working for Respondent as an apprentice, Yarbrough would have to terminate Hann's apprenticeship agreement. Hann, who testified on behalf of the Union in the February 22, 2002 representation hearing, was never contacted for work by Respondent thereafter.

B. Discussion and Analysis

To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected concerted activity. The burden of persuasion then shifts to the employer to show that it would have made the same decision even absent the union or protected activity. See *Techno Construction Corp.*, 333 NLRB 75 (2001), and cases there cited. As part of his initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. See *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997). Indeed, it has long been recognized that where an employer's reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). See also *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).

In this case, the General Counsel has shown that Respondent terminated employees Hemberger and Henze because of their union activities and affiliation. Respondent's explanations for the terminations are pretexts and those pretextual explanations, along with an analysis of the circumstances of their terminations support findings of discrimination. Since the Respondent's explanations are pretextual, the General Counsel has not only met his initial burden of proving discrimination, but the Respondent has failed to show that it would have terminated Hemberger and Henze in the absence of their union and protected activity. See *National Steel*, cited above.

Hemberger, a highly regarded employee, who was, in effect, Yarbrough's eyes and ears on the Vineland jobsite when Yarbrough was not present, was precipitously asked to resign because of purported unsatisfactory work. This occurred shortly after Hemberger contacted the Union and started soliciting his fellow employees about union representation. He had never previously been warned about poor work performance. Indeed, in his previous employment with Respondent, which took him from project to project, Hemberger had received very favorable evaluations. That Yarbrough was not serious about Hemberger's alleged unsatisfactory work is confirmed by the fact that Yarbrough permitted him to work on the Vineland job for 2 days after asking him to resign and threatening to terminate him if he did not. This shows that Hemberger's alleged unsatisfactory work was not the real reason for the termination. Nor is there any evidence that Yarbrough observed any other problems with Hemberger's work on the remaining 2 days he worked on the Vineland job. Yarbrough did not even appear on the jobsite on Thursday, January 10. Yarbrough did not take any action against Hemberger because he apparently viewed Hemberger's initial union activities as just a passing fancy. Even after the Union set up its picket line on Friday morning, January 11, Yarbrough was prepared to have Hemberger continue to work for him. When Hemberger told Yarbrough he had a problem crossing the picket line, Yarbrough responded that Hemberger had a legal right to cross the line if he wished. When Hemberger joined the picket line, however, Yarbrough knew that he had a viper in his midst. Hemberger was never again employed by Respondent, even though the Respondent did subsequently resume work on the Vineland job and had other jobs at other locations to which Hemberger could have been assigned. Significantly, Hemberger had previously moved from project to project for the Respondent. In contrast, after the Union targeted Respondent—and after Yarbrough learned that Hemberger was probably responsible for approaching the Union—Respondent did not employ Hemberger on any of its projects.

The Respondent's discriminatory motive is confirmed by Yarbrough's statement to employee Hann that Hemberger was no longer working for Respondent because Hemberger had joined the Union. Yarbrough also expressed the fear that Hemberger would find out about Hann working on his house and threatened Hann that that job would end if Hann told Hemberger about it. These statements not only confirm the discrimination against Hemberger, but also amount to threats and coercion, constituting independent violations of Section 8(a)(1) of the Act.

The Respondent's contention that it terminated Hemberger because of unsatisfactory work is not only unpersuasive but amounts to a pretext. As indicated, Hemberger was permitted to work even after being threatened with discharge for allegedly poor work. Moreover, until he initiated contacts with the Union and solicited his fellow employees on behalf of the Union, he was viewed as a model employee. He received commendations and no warnings or criticisms about his work. Indeed, Respondent was unable to specify how Hemberger's work became unacceptable after the onset of the Union, beyond general objections to productivity. Also supporting findings of pretext and discrimination is the Respondent's contention that Hemberger was somehow terminated because he assigned employees to a different section of the job, contrary to Yarbrough's instructions. Not only was this not mentioned in the written memo delivered to Hemberger on January 9, but Hemberger's credible and uncontradicted testimony is that he was directed to do so by the general contractor's job superintendent. Respondent also shifted reasons for the termination by suggesting that Hemberger was somehow disloyal for having agreed to work on the Vineland job for the general contractor after Respondent's subcontract had been terminated. This was, of course, an afterthought. By then, Respondent had decided to sever any relations with Hemberger and Yarbrough's curt treatment of Hemberger when the latter attempted to obtain other work simply confirms the discrimination against him. Finally, Respondent's contention that Hemberger was insubordinate during the January 9 conversation between him and Yarbrough is clearly without merit. It is based solely on Yarbrough's testimony, which was contradicted by Hemberger, who denied Yarbrough's account. Not only was Hemberger a more reliable witness than Yarbrough, but Yarbrough's essentially uncorroborated account is contradicted by objective circumstances. Had Hemberger been as insubordinate as Yarbrough suggested, it is unlikely that Yarbrough would have let him work the rest of the day and the next or suggested that he cross the Union's picket line on January 11.

Further support for the pretext and discrimination findings is found in the documentary evidence, which establishes that

other employees were tolerated for unsatisfactory work and worse without being discharged. Respondent issued warnings to those employees. Such disparate treatment supports the inference that the reasons advanced for Hemberger's termination were pretexts and his termination was in fact cause by his union activities. Indeed, Respondent's termination of Hemberger was in violation of the progressive disciplinary policy set forth in its handbook. In these circumstances, Respondent's evidence not only fails to rebut the inference of discrimination established by the General Counsel's evidence but rather confirms it.

Contrary to Respondent's contention, the finding of discrimination is not defeated because of an alleged lack of knowledge of Hemberger's union activities. Although there is no direct evidence that Yarbrough knew of Hemberger's involvement with the Union before his January 9 threat to terminate Hemberger, there is plenty of evidence of such knowledge thereafter and before Respondent decided to terminate Hemberger. Thus, at the time that Respondent effectively terminated Hemberger's employment by not offering him work, Respondent clearly knew of his union activities. Indeed, even before the January 9 threat of termination, the evidence supports an inference that Yarbrough knew of Hemberger's initial union activities. Tokach was the only employee who, after being approached by Hemberger and Union Official Thompson, expressed his opposition to the Union. On a job with only three employees, it is reasonable to infer that Yarbrough learned both of Hemberger's union leadership role and the visit of a union official to the jobsite; the latter would be an unusual circumstance likely to be reported, at least by an employee, who opposed the Union, to a boss, who admittedly disfavored unions. Tokach was a person who readily reported union activity to Yarbrough, as shown by his report to Yarbrough when Union member Henze first showed up on the Vineland jobsite later in January. In these circumstances, I do not credit Tokach's denial that he reported Hemberger's union activities to Yarbrough. Moreover, other circumstances, including the pretextual reasons advanced by Respondent in Hemberger's case, the fact that Yarbrough focused on Hemberger in his conversations about the Union with Hann and Yarbrough's discrimination against Henze and his unilateral termination of the project-only agreement with the Union, all confirm that Yarbrough both engaged in discrimination and knew of Hemberger's union activities. Accordingly, I find that Yarbrough not only knew of those activities before Hemberger's eventual termination, but also that he knew of at least some of them as early as January 9 when he threatened to terminate Hemberger. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995) (employer knowledge of union activities may be inferred from circumstantial evidence, including pretextual explanations and other factors that lead to the inference of discrimination itself); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002).

Respondent's termination of Henze was also discriminatorily motivated. After Respondent decided, for discriminatory reasons, to no longer employ and therefore terminate Hemberger, it entered into a project-only agreement with the Union. The agreement, concluded on January 28, 2002, was not Yarbrough's idea. He was pressured to resolve his dispute with the Union not only by the picketing 2 weeks before, but also by the general contractor, who suggested he contact the Union. Thus, Yarbrough grudgingly employed Union member Tom Henze on the Vineland job on January 28. It is not without significance that Henze, a painter with 20 years of experience, lasted only 3 days before he was fired. In the interim, the Union filed an election petition with the Board seeking an election, which might have led to exclusive representation for the Union on Respondent's jobs throughout the State of New Jersey. This was obviously something quite different, qualitatively, and therefore more objectionable to Yarbrough than the project-only agreement Respondent had concluded with the Union. Indeed, Yarbrough admitted that Henze's work the first 2 days of his employment was satisfactory. The next day, however, Respondent received a faxed copy of the Union's election petition. Thus, the timing, immediately thereafter, of Henze's termination, after only 3 days on the job, when coupled with the discrimination against Hemberger and Yarbrough's antiunion statements to Hann all add up to an inference that Henze too was terminated for union reasons.[5]

Respondent's animus is reflected by Yarbrough's statement in the letter discharging Henze that he was not going to work the Vineland job until he and the Union clarified their project-only agreement. It is also reflected in Yarbrough's unilateral termination of the project-only agreement with the Union the day after Henze's termination. Respondent did not ask the Union to replace Henze in accordance with the agreement's requirement that it employ one union painter on the job. Even assuming that Henze did not work out, it would seem natural for an employer without a discriminatory motive to seek another union painter. Yarbrough's retort—that he feared the Union was complicit in slowing down the job—is inherently implausible. The Union was seeking representation in a way that would increase the number of union painters utilized by Respondent. There would be no reason for the Union to sabotage its incipient relationship with the Respondent. Nor did Yarbrough's letter to the Union discharging Henze mention an alleged slowdown or the Union's complicity in it. Finally, as shown below, there was not in fact a slowdown. In these circumstances, the General Counsel has proved that at least a reason for Respondent's termination of Henze was discriminatory.

Nor has Respondent shown that it would have terminated Henze for lawful reasons. Its contention that he was fired for poor work performance was a pretext. This is shown not only by the Respondent's facile use of pretext to get rid of Hemberger, but also by reference to the same documentary evidence mentioned above in the discussion of Hemberger's termination. Respondent tolerated a lot worse than Henze without discharging the affected employees, even assuming that Henze did not perform satisfactorily in his last day of employment. Such disparate treatment belies Respondent's contention that Henze was terminated for cause. Indeed, as in the termination of Hemberger, Respondent failed to follow the progressive discipline policy set forth in its handbook when it precipitously

[5] I do not credit Yarbrough's self-serving and unconvincing testimony that he personally was unaware of the election petition until after he terminated Henze.

discharged Henze. Moreover, the evidence does not support Respondent's contention that Henze performed unsatisfactorily on the Vineland job. According to Respondent, Henze had only painted 5 doors by midday on January 30, and had not done many more by 3 p.m. that day, when he was fired. Henze allegedly had been told 2 days before, after Tokach spoke to Yarbrough, that Respondent expected him to paint 28 doors a day. But that instruction was given after Tokach, surprised by the appearance of a union painter on the job, called Yarbrough to talk to him about Henze. Moreover, the evidence in this case does not show that such a standard—the painting of 28 doors per day on the Vineland job—was met either by Tokach or any other employee on the Vineland job. If that indeed was the standard, Henze must have met it for the first 2 days of his employment because Respondent found his work on those days perfectly satisfactory. Even on the third day, when he was fired, Henze was instructed to perform other painting besides simply doing doors. Henze was simply following Tokach's instructions, presumably forwarded to him by Yarbrough. Significantly, Tokach admitted that he had instructed Henze to do other work because Henze had finished his doors for the day; the rest of them were "wet." To the extent that some of Tokach's testimony concerning Henze's work differs from that of Henze, I credit Henze. Tokach's testimony on this point was ambiguous and Henze's was more detailed and reliable. Henze's uncontradicted testimony also establishes that he had been praised for his work on the Vineland job by a representative of the general contractor, who inspected his work.

All of this evidence supports the inference, which I make, that, absent Henze's union affiliation and Respondent's antipathy to the Union, particularly the Union's effort to represent all of Respondent's employees in New Jersey, Respondent would not have discharged Henze.

The alleged discriminatory layoff of apprentice Phillip Hann presents a much different situation. It is clear that Yarbrough made unlawful and coercive statements to Hann implicating Hemberger's union activities. But it does not seem that Yarbrough blamed Hann for supporting the Union. It is unclear whether Yarbrough even knew that Hann supported the Union; it is possible that he simply suspected that Hann was interested. It is clear, however, that Yarbrough was more concerned about Hemberger's leadership role in the Union. Hann was at most a passive union supporter who was not targeted for adverse action. Significantly, Respondent continued to employ Hann even after it discriminatorily terminated Hemberger and Henze. Yarbrough utilized Hann for work at Respondent's shop and for work painting his personal residence. Yarbrough also used Hann to finish up the Vineland job on both February 2 and February 12. Yarbrough and Hann came to a parting of the ways in mid-February when Hann declined a job to which he was assigned because he no longer wanted to work for Respondent as an apprentice and because he wanted to be free to perform work for other people as an independent contractor. Respondent was unwilling to employ Hann as a journeyman and the General Counsel has not shown that Hann was qualified to work as a journeyman at this time or that Respondent's failure to employ Hann as a journeyman was somehow discriminatory. In these circumstances, I cannot find that Respondent's failure to subsequently employ Hann (the General Counsel labels such action a layoff) was discriminatory.

The General Counsel's strongest evidence of discrimination against Hann is based on Yarbrough's failure to continue to use Hann to paint Yarbrough's house after February 5, the day before Yarbrough went on vacation. According to Hann's testimony, on the evening of February 5, Yarbrough told Hann that he was shutting down the job of painting Yarbrough's personal residence because of "problems with the Union or something." (Tr. 206.) I have difficulty in crediting this testimony, even though I have credited some of Hann's testimony elsewhere in this decision. Hann's testimony on this particular point seems ambiguous and implausible. Hann himself had not been identified as a strong union advocate. Yarbrough had in any event employed Hann to paint his house despite the troubles on the Vineland job and Yarbrough's problems with the Union. There is no reason to believe that Respondent's union problems extended to Hann's painting Yarbrough's house. Although I can accept that Yarbrough shared with Hann his concern about Hemberger's union activities, I cannot go further and accept the notion that Yarbrough needed to stop Hann from painting his house because of his problems with the Union. Indeed, in an earlier statement, Yarbrough had told Hann not to tell Hemberger that Hann was painting his house or Hann would no longer have that work. But there is no evidence that Hann told Hemberger that he was painting Yarbrough's house or that Hemberger or the Union cared about this work. Contrary to Hann's testimony about the circumstance of his no longer being permitted to paint Yarbrough's house after February 5, I find much more plausible Yarbrough's explanation that he did not want Hann to be painting his house and having access to it during a period when he would be away. After Yarbrough returned, Hann was not utilized to finish the painting of the residence because he was assigned other work and shortly thereafter chose no longer to be employed by Respondent, as shown below. I also find plausible that Yarbrough gave Hann the assignment to paint the Yarbrough residence because Yarbrough wanted to keep Hann busy, as Yarbrough testified. Hann was, after all, an apprentice and operating under an apprenticeship agreement.

Accordingly, even assuming that Yarbrough's employment of Hann to paint his personal residence is attributable to the Respondent, an issue I do not reach, I find that the General Counsel has not shown by a preponderance of the credible evidence that Yarbrough halted Hann's work on his house for discriminatory reasons.

More significantly, uncontradicted testimony shows that, even after Yarbrough stopped Hann from working on his house, he continued to employ Hann. Thus, whatever animus motivated Yarbrough to stop using Hann to paint his house, it did not prevent Hann from continuing to be employed by Respondent. Hann was assigned to work on the Vineland job on February 12, the last day Respondent worked on that job. Moreover, Hann was assigned to another job after that, a job to which Hann refused to report because he was no longer interested in working as an apprentice and because he wanted to be free to pursue other work as an independent contractor. It is thus clear to me that Hann was not discriminatorily laid off, as

the General Counsel suggests, but that Hann voluntarily terminated his relationship with the Respondent. In the absence of any showing that Hann was qualified to be employed as a journeyman and that he was denied such status for discriminatory reasons, I cannot find that Hann was laid off or otherwise terminated for union reasons. Even if the General Counsel had made an initial showing of discrimination based on the failure of Yarbrough to continue to use Hann to finish painting his house, I would find that the termination of Hann's employment with Respondent thereafter took place because of nondiscriminatory reasons.

CONCLUSIONS OF LAW

1. By discriminatorily terminating employees Tim Hemberger and Tom Henze, Respondent violated Section 8(a)(3) and (1) of the Act.
2. By making coercive or threatening statements about union activities to employee Phillip Hann, Respondent violated Section 8(a)(1) of the Act.
3. The above unfair labor practices affect commerce within the meaning of the Act.
4. Respondent has not otherwise violated the Act.

REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it be required to cease and desist from such conduct and post an appropriate notice. It must offer reinstatement to Hemberger and Henze and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of termination to the date of a proper offer of reinstatement, less interim earnings, as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The record in this case indicates that Henze may have had expectations of employment only for the Vineland job, but it appears that Hemberger worked on a project-to-project basis and would continue to have been employed on other projects, absent the discrimination against him. See *Dean General Contractors*, 285 NLRB 573 (1987). Any further questions on these matters may be resolved in the compliance proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Pro-Spec Painting, Inc., Vineland, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Making coercive or threatening statements to employees with regard to their union activities or those of other employees.

(b) Terminating, refusing to employ or otherwise discriminating against employees because they engage in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tim Hemberger and Tom Henze full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Hemberger and Henze whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Hemberger and Henze and, within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way in the future.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Vineland, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specially found.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten or coerce employees for engaging in union activities.

WE WILL NOT terminate, discharge, refuse to employ, or otherwise discriminate against any of you for engaging in union or other protected, concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of at the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tim Hemberger and Tom Henze full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tim Hemberger and Tom Henze whole for any loss of earnings and other benefits resulting from their unlawful terminations, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Hemberger and Henze, and WE WILL, within 3 days thereafter, notify them that these will not be used against them in any way.

PRO-SPEC PAINTING, INC.